GOH HOOI YIN

v.

LIM TEONG GHEE & ORS.

HIGH COURT MALAYA, PENANG
EDGAR JOSEPH JR J
[CIVIL SUIT NO. 212 OF 1974]
25 MAY 1990

CONTRACT: *Sale and purchase of shophouse - Misrepresentation by vendor that it is the registered proprietor - Vendor purported to forfeit deposit & request for completion by way of notice - Whether time of the essence - Validity of notice - Purchaser's right to elect for rescission or treat contract as on foot - Whether purchaser was justified in withholding the balance of purchase price until vendor able to satisfy that it had legal title - Purchaser's readiness to complete - Whether fraudulent act on the part of vendor in transferring the property to 3rd party - Section 56(2) Contracts Act - Fraud under s. 340 National Land Code 1965.*

The plaintiff entered into an agreement to purchase certain premises known as 53, King St. Penang ("the disputed property") from the 4th defendant on proposals & representation made by 1st and 2nd defendants (being the assistant manager and senior assistant manager respectively of the 3rd defendant).

The said agreement was signed on 9 July 1973 by the plaintiff and one of the directors of the 4th defendant at the 3rd defendant's premises. The contract of sale was prepared by a solicitor who claimed to have been instructed by the 1st defendant on behalf of the plaintiff. The contract stipulates that the date of completion to be on or before 6 November 1973.

In the interim, it was revealed that on 29 August 1973 the 4th defendant entered into an agreement in writing to purchase the disputed property from a 3rd party at the price of RM185,000 and pursuant thereto it was only on 30 November 1973 that it became the registered proprietor thereof.

On 6 November 1973, the 4th defendant, through its solicitors, purported to forfeit the deposit of RM17,000 paid by the plaintiff. However, no notice making time the essence of the contract had been served.

The plaintiff's solicitor on 23 November 1973 wrote to the 4th defendant stating that the plaintiff was prepared to complete the purchase within 2 days if the 4th defendant was the registered proprietor, failing which the plaintiff would rescind the contract on grounds of misrepresentation by the 4th defendant and sue for the recovery of the deposit and damages.

The plaintiff did issue a writ on 18 June 1974 against 1st, 2nd, 3rd and 4th defendants. It was alleged by plaintiff that the representation both in the recital to the contract of sale and by the 1st and 2nd defendant that the 4th defendant was the registered proprietor of the disputed property was false. However the action against the 1st, 2nd and 3rd defendants was later discontinued. As to the 5th defendant, it was added as a party only at the hearing when the plaintiff discovered that the disputed property had been transferred by 4th defendant to it.

The questions for determination were:

(a) whether the 4th defendant was entitled to rescind the contract of sale and to forfeit the deposit in the manner it did?

(b) whether the plaintiff was justified in withholding the payment of the balance of the purchase price until the 4th defendant was able to satisfy the plaintiff that it had legal title to the disputed property at the material time.

(c) whether the plaintiff was ready to complete at the material time.

(d) were there any fraudulent acts on the part of both 4th and 5th defendants?

Held:

[1] The purported notice dated 6 November 1973 by the 4th defendant threatening forfeiture of the deposit and requiring completion on the same day was not a reasonable notice nor valid or effective:

(a) as it is obvious that there was no express words stipulating that time shall be of the essence of the contract; the nature of the subject matter of this contract namely an ordinary shophouse with vacant possession would need very special circumstances to make time of the essence of the contract. The law applicable as regards this is contained in s. 56(2) of the Contracts Act.

(b) clause 3 of the contract provides that the balance of the purchase price was to be paid by 6 November 1973 and so any notice terminating the contract of sale under Clause 7 would have to be given thereafter that is, after 6 November 1973. In this case the notice was sent on 6 November 1973 and dated 6 November 1973. Thus it was premature.

(c) the notice was not addressed to the plaintiff but to one solicitors firm which it turned out was not the plaintiff's solicitor.

[2] It is settled law that the recipient of an invalid notice is entitled to treat it as a repudiation of the contract by the giver, rescind by accepting the repudiation and thereafter be excused from further performance and either sue for all moneys paid or sue for damages for breach. On the other hand, he is also entitled to treat the contract as on foot, continue performing his obligation and in particular tender payment and seek specific performance. In the present case, the plaintiff had by letter dated 23 November 1972 elected to treat the contract as on foot.

[3] The precise nature of the 4th defendant's obligations under the terms of the contract is to be in a position to give title to the plaintiff (C13 and 5 of the Contract of Sale) on or before 6 November 1973. Whether or not the 4th defendant is the registered proprietor of the disputed property did not matter. There is nothing inherently impossible in the performance of an agreement to sell land, belonging to a 3rd person - see *Rosel v. Adam* [1876] 2 VLR(L) 170, 4 Austin Digest 662. The plaintiff was therefore not justified in withholding payment of the balance of the purchase price until the 4th defendant was able to satisfy the plaintiff that it had a legal title to the property at the material time.

[4] The stand which the plaintiff took coincided with the obligations of the parties arising from a proper construction of the contract for sale. The primary inquiry will always be as to the precise nature of the vendor's obligations under the terms of the particular contract order to effect completion. The plaintiff was therefore not justified in withholding payment of the balance of the purchase time.

[5] On the evidence the 4th defendant had shown itself to be ready, willing and able to proceed to complete the contract of sale on accordance with its terms had the plaintiff paid the balance of the purchase price.

[6] The plaintiff was not able to discharge his financial obligation under the contract of sale and therefore could not have served an effective notice to complete.

[7] In relation to the charge of fraud against the 1st defendant, since the plaintiff is not entitled to an order for specific performance against the 4th defendant then his action against the 5th defendant must be dismissed. Discussion on elements of fraud under s. 380 of the NLC.

[Action against 4th & 5th defendant, dismissed with costs.]

Cases referred to:
S. Ayadurai v. Lim Hye [1959] MLJ 143
Smith v. Hamilton [1951] 1 Ch 174
Mehmet v. Benson [1965] 113 CLR 295
Kennedy v. Vercoe [1960] 105 CLR 521
Monaghan v. Thomas [1974] NZLR 340
Howard v. Pickford Tool Co. Ltd. [1951] 1 KB 417
Frost v. Knight [1872] LR 7 Ex Ch 111
Avery v. Bowden [1866] 5 E & B 714; 119 ER 1119
Haynes v. Hirst [1927] 27 SR (NSW) 480
Macdonald v. Marson [1913] 33 NZLR 248
Harold Elliot Ltd. v. Pierson [1948] 1 Ch 452
Rands Developments Private Ltd. v. Davis [1975] 6 ALR 631
Jonray (Sydney) Pty. Ltd. v. Partridge Bros. Ltd. [1969] 89 WN (NSW) 568
R. v. Cunningham [1899] 1 WALR 9
Rosel v. Adam [1876] 2 VLR(L) 170
Tan Suan Sim v. Chang Fook Sheng [1980] 2 MLJ 66
Ward v. Ellerton [1927] VLR 494
Establishment Chainbaux SARL v. Harbormaster Ltd. [1955] 1 Ll Rep 303
Universal Cargo Carriers Corporation v. Citati [1988] 62 ALJR 268
Bahr v. Nicolay (No.2) [1988] 62 ALJR 268
PJTV Denson (M) Sdn. Bhd. v. Roxy (M) Sdn. Bhd. [1980] 2 MLJ 136
Green v. Nixon [1857] 53 ER 208
Waimiha Sawmill Co. v. Waione Timber Co. [1926] AC 101
Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors. [1983] CLJ (Rep) 387
Mills v. Stokman [1967] 116 CLR 61
Assets Co. v. Mere Roihi [1906] AC 176
Saminathan v. Pappa [1981] 1 MLJ 121

Legislation referred to:
Contracts Act 1950, s. 56(2)
National Land Code 1965, s. 328(1)

For the plaintiff - Mahinder Singh Dulku; M/s. Mahinder Singh Dulku & Co.
For the 1st and 2nd defendants - Thillaimuthu; M/s. Thillaimuthu & Phock Kin
For the 3rd defendant - C. Abraham; M/s. Shearn Delamore & Co.
For the 4th defendant - Lim Cheng Poh; M/s. Lim Cheng Poh, Lim & Rahim
For the 5th defendant - Benjamin Yean Choon Hau; M/s. Abdul Aziz, Ong & Co.

JUDGMENT

Edgar Joseph Jr J:

According to the plaintiff, Mr. Goh Hooi Yin, in July 1973, he was a customer of the First National City Bank (Penang branch), the third defendant, and so it was known to Mr. Lim Teong Ghee, the first defendant and Mr. Kung Beng Hong, the second defendant, they being

the assistant manager and senior assistant manager, respectively of the third defendant, that he had recently sold his interest in a partnership business and thus had money available for investment.

Sometime in or about the first week of July 1973, at the premises of the third defendant, the first defendant suggested that the plaintiff might wish to purchase certain premises known as 53, King Street, Penang, ("the disputed property") from Weng Lye Development Sdn. Bhd., the fourth defendant, also a customer of the third defendant, whose overdraft had exceeded its limit. The first defendant added that it would be helpful to the third defendant if such a sale were to take place as it would reduce the fourth defendant's overdraft and promised to use his good offices with the fourth defendant to put through the sale to the plaintiff at a price advantageous to the plaintiff.

The plaintiff was attracted by the first defendant's proposal and promised that if the deal were to go through he would pay to the first defendant (for himself and the second defendant) a commission of RM5,000 for their efforts.

So, it was said that in or about July 1973, the plaintiff called at the third defendant's premises and enquired of the first defendant about the title and ownership of the disputed property and the latter assured the plaintiff that the title deed was lying in the vaults of the third defendant's premises having been deposited there as security for the fourth defendant's overdraft facility.

The second defendant who was present on this occasion, also assured the plaintiff that the fourth defendant was the owner of the disputed property.

The plaintiff alleged that the representations as to ownership by the first and second defendants, were made falsely with the intention of inducing him to purchase the disputed property and in breach of their duty to him.

On 9 July 1973, at the third defendant's premises, the second defendant informed the plaintiff that he had persuaded the fourth defendant to sell the disputed property to the plaintiff at a price of RM175,000 despite the fact that there was another buyer in the market at RM180,000.

The first and second defendants, it was said, well knew that the plaintiff required the disputed property for the purpose of a finance company, a motor servicing and repair garage and a Castrol oil distribution service.

Later on the same day, that is to say, on 9 July 1973 the plaintiff's solicitor Mr. Charles Ong attended at the third defendant's premises, bringing along with him a contract of sale of the disputed property, which he had prepared upon the instructions of the first defendant given on behalf of the plaintiff and which recited that the fourth defendant was the registered proprietor thereof.

In reliance upon the representations of the first and second defendants as to the title and ownership of the disputed property and being ignorant of the need to make a search of the register document of title, the plaintiff without further ado, signed the contract of sale in the presence of the solicitor Mr. Charles Ong and the first defendant. At the same time, pursuant to the contract of sale, the plaintiff paid to the fourth defendant a sum of RM17,500 as a deposit and part payment of the purchase price.

Also, at the same time and place, the fourth defendant executed the contract of sale - more particularly, one Mr. Ooi Choon Lye, a director of the fourth defendant signed on its behalf.

It was alleged by the plaintiff that the representation both in the recital to the contract of sale and by the first and the second defendants, that the fourth defendant was the owner of the disputed property was false and untrue and made by the first, the second and the fourth defendants (through its director) knowing the same to be false and untrue.

It was further alleged by the plaintiff in his statement of claim, though not in evidence, that on 14 July 1978, being ignorant of the breaches of duty owed by the first and second defendants to him, he had paid a sum of RM5,000 to the first defendant as commission for the first and the second defendants for their efforts as aforesaid.

I would, at this point, interrupt the narrative of events, according to the plaintiff's version, and point out that this allegation about the payment of commission to the first and the second defendants was in fact abandoned at the hearing when the case was part heard and, indeed, the plaintiff discontinued the action against them and the third defendant. However, the action as against the fourth and fifth defendants continued.

Now, it was only on 29 August 1973 that the fourth defendant entered into an agreement in writing to purchase the disputed property from one Yusuf Salehbhoy Abdeali (DW4) as Attorney for one Khandelwal a/l Lachminarayan Khandelwal at price of RM185,000 and pursuant thereto it was only on 30 November 1973, that it became the registered proprietor thereof.

Then, on 6 November 1973 by a letter dated the same day, the fourth defendant had, through its solicitors Messrs Karpal Singh & Wong, purported to forfeit the deposit of RM17,500 paid by the plaintiff although - and this was stressed - no notice making time the essence of the contract had been served. That letter which was addressed to Messrs Jayaraman Ong & Company as solicitors for the plaintiff was in the following terms:

> Dear Sirs,
>
> **Re: Holding No. 283, T.S.20, N.E.D., Penang together with house No. 53, King Street, Penang erected thereon**
>
> We act for Messrs. Weng Lye Development Sdn. Berhad and are instructed to refer to the agreement for sale dated 9 July 1973 entered into between our clients as vendors and your client, Mr. Goh Hooi Yin as purchaser in respect of the above property.
>
> Kindly take notice that the balance purchase price indicated in Clause 3 of the said agreement shall be paid by today, and unless we receive the same immediately, the deposit shall be forfeited in accordance with Clause 7 of the said agreement for sale.
>
> Yours faithfully,
> sgd. Karpal Singh, Wong & Co.
>
> c.c.,
>
> M/s. Weng Lye Development
> Sdn. Berhad,
> 25, Light Street,
> Penang

On the same day, Messrs Jayaraman, Ong Co. replied by letter as follows:

> Dear Sirs,
>
> **Re: Holding No. 283, T.S. 20, N.E.D., Penang together with house No: 53, King Street, Penang erected thereon**

We refer to your letter of 6 November 1973 and are to state that we are no longer acting for the purchaser in respect of the above matter.

Yours faithfully,

sgd. Jayaraman Ong & Co.

c.c.

Mr. Goh Hooi Yin,
12, Vermont Road,
Penang

The plaintiff went on to allege that he had been at all material times and was even now willing and able to perform all his obligations under the contract of sale.

Other facts material to the plaintiff's case, in so far as they affected the fourth and the fifth defendants, were these. On 10 November 1974, the plaintiff had caused to be lodged a private caveat against the disputed property but it having expired on 20 November 1980, by effluxion of time, by reason of s. 328(1) of the National Land Code 1965, ("the Code") the plaintiff lodged a second caveat which had also expired by effluxion of time on 18 November 1986. The plaintiff claimed that he did not lodge a subsequent caveat as the fourth defendant's former solicitors Messrs Jayadeva and Kamal had given an oral undertaking to his solicitors that their clients would not transfer the disputed property pending the determination of this action.

But, on 19 August 1980, while the first caveat was still in force, the fourth defendant purported to sell the disputed property to the fifth defendant at a price, ostensibly, of RM3,315,913 and later, on 21 April 1987, secured the registration of the transfer thereof by which time the second caveat aforesaid had also expired. In his letter before action dated 23 November 1973, and addressed to the fourth defendant (pp. 15, 16 AB1), the plaintiff, through his solicitors Messrs Lee Kok Liang & Co., stated as follows:

Dear Sir,

Re: Holding No. 283, T.S.20, N.E.D., Penang

We are instructed by Mr. Goh Hooi Yin, of No. 12, Vermont Road, Penang to refer to an agreement dated 9 July 1973 entered into (by) your company as vendor and our client as purchaser with respect to the above property.

We are instructed to state that in the recital of the agreement, you held yourself out as the Registered Proprietor of Holding No. 283, T.S.20, N.E.D. Our client has paid you a deposit of RM17,500 under the said agreement.

Our client instructs us to state that on the day of the agreement and even up to today, your firm is not the Registered Proprietor of Holding No. 283, T.S.20, N.E.D.

Our client states that your representative has at all material times given assurance to our client that your firm is the Registered Proprietor of Lot No. 283, T.S.20, N.E.D., Penang. Our client has been misled on this very vital fact and therefore he entered into an agreement with your firm on the representation so made by your firm's representative.

We are instructed to state however that our client is prepared to complete the purchase within two (2) days from the date hereof if you are the registered owner thereof failing which our client will rescind the contract on the grounds of misdescription and or misrepresentation and sue for the recovery of the said sum of RM17,500 and damages estimated at RM35,000.

Kindly acknowledge receipt.

Yours faithfully,
sgd.

c.c. Client.

This evoked the following lengthy response by the fourth defendant by letter dated 27 November 1973 through their solicitors Messrs. Presgrave and Matthews:

Dear Sirs,

Re: Agreement dated 9 July 1973 between Weng Lye Development Sendirian Berhad and Goh Hooi Yin.

Holding No. 283, T.S.20, N.E.D., Penang together with Premises No. 53 King Street, Penang

We are instructed by Weng Lye Development Sendirian Berhad to acknowledge receipt of your letter of 23rd inst.

We are instructed to deny that your client has been misled or that there has been any misrepresentation by our client as alleged. Your client knew very well prior to the execution of the agreement that our client was not the registered proprietor as he was informed in the course of negotiations for the purchase of this property in the presence of reputable witnesses that our client had purchased the property in question under an agreement of sale from the registered proprietor but that it had not been transferred to them. The agreement was drawn up by your client's former solicitors, Messrs. Jayaraman, Ong & Co. in a hurry for the purposes of execution on his instructions and he should have informed them accordingly, but in any event our client handed to your client's former solicitors soon after their agreement with the registered proprietor; they therefore knew shortly after the agreement was executed that our client was not the registered proprietor but was acting under an agreement of sale and they said that this did not matter or affect the position.

We are further instructed to add that your client's knowledge that our client was not the registered proprietor is reinforced by the fact that your client presented to our client certain building plans drawn up by his architect for signature by our client prior to submission to the City Council of George Town but our client pointed out that they were not the registered proprietor and so could not sign the plans; this was intimated both to your client and his former solicitors who are well aware of the position.

The point however is that it did not matter one whit whether our client was the registered proprietor or not as their obligation under the agreement was to give title to your client in accordance with the provisions of Clause 5 thereof upon payment of the balance purchase price by your client on or before 6 November 1973 pursuant to the provisions of Clause 3 thereof. This our client was at all material times ready, willing and able to do and indeed the registered proprietor was available at all material times to execute a valid and registrable transfer in favour of your client. If our client had failed to give your client a valid and registrable transfer after payment of the balance purchase price by him, then Clause 6 of the agreement which specifies your client's rights in such circumstances would become operative. Your client however failed to tender or pay the balance purchase price on or before 6 November 1973 and as a result the provisions of Clause 7 of the agreement immediately became operative.

Our client did press your client and his former solicitors time and again to complete the sale well before the final date specified in the agreement but your client would not do so but stated that he would wait till that date, this again in the presence of refutable witnesses. We repeat that no payment of the balance purchase price was tendered or made by your client on or before 6 November 1973 as stipulated in the agreement. And indeed our client's former solicitors, Messrs. Karpal Singh, Wong & Co. wrote to your client's former solicitors on

6 November 1973 giving notice that the balance purchase price specified in Clause 3 of the agreement should be paid by that date and that unless it was so paid the deposit would be forfeited in accordance with Clause 7 of the agreement. Our client knows as a fact that this letter was in fact passed on to your client by his former solicitor.

You speak of rescission by your client in the penultimate paragraph of your letter. No such question can conceivably arise as on the failure of your client to comply with the provisions of Clause 3 the agreement was determined and the deposit paid forfeited to our client. As far as our client is concerned this is the position and it remains so and your client has no rights whatsoever under the agreement which has already determined and is no longer of any effect in view of the specified provisions provided for in the event of your client's failure to pay the balance purchase price within the time expressly stipulated.

We are instructed to state that the stand your client purports to take as evinced in your letter is a completely misconceived after-thought after a lapse of some 17 days after the due date as an excuse for his own default and a feeble attempt to reinstate his position on completely false premises. Our client is not deterred by the threat of proceedings which you intimate and we would only add your client is welcome to do so at his peril as to costs.

Yours faithfully,
Presgrave & Matthews

Messrs. Lee Kok Liang & Co.,
Advocates & Solicitors,
22-A Beach Street,
Penang

The plaintiff also sent through his solicitors a letter before action against the first, the second and the third defendants, which I do not propose to reproduce since the action against them was, as I have said, discontinued, in the midst of the hearing.

Then, on 18 June 1974, the plaintiff caused to be issued his writ of summons accompanied by a statement of claim wherein he named, as defendants, the first, the second, the third and the fourth defendants. The fifth defendant was, of course, added as a party only at the hearing when the plaintiff discovered that the disputed property had been transferred by the fourth defendant to it.

It was the case for the plaintiff that the fifth defendant was in fact not a *bona fide* purchaser for value without notice of the plaintiff's interest in the disputed property. In particular, the plaintiff alleged that the purpose of the purported sale by the fourth defendant to the fifth defendant was "merely a fraudulent device engineered to deprive the plaintiff of the benefit of his action for specific performance of the contract dated 9 July 1973 against the fourth defendant.

The particulars of fraud upon which the plaintiff relied were as follows:

(i) The fifth defendant and the fourth defendant were controlled by the same persons and/ or persons who were closely related to one another. In support of this averment, it was pointed out that:

(a) Puan Sri Fatimah Zahrin bte. Ismail who is a director of the fifth defendant is the wife of Tan Sri Abdul Aziz bin Zain, a director of the fourth defendant.

(b) Mr. Leong Chee Kong who is a director of the fifth defendant is also a director of the fourth defendant and a signatory of the resolution passed by the board of directors of the fourth defendant and the fifth defendant authorising the sale of the disputed property by the fourth defendant to the fifth defendant.

(c) Mr. Leong Chee Kong had also affirmed the affidavits on behalf of the fourth defendant and the fifth defendant in these proceedings.

(ii) The registered office of the fourth defendant is at the disputed property where the fifth defendant also has a place of business.

(iii) The fifth defendant knew or ought to have known of the plaintiff's suit herein for specific performance against the fourth defendant when it agreed to buy the disputed property from the fourth defendant, having regard to the matters alleged in para. (i) *supra*.

(iv) The resolution of the board of directors of the fifth defendant passed on 29 August 1980 which showed it had been resolved to purchase from the fourth defendant the disputed property "together with encumbrances thereon, if any, for a cash sum of RM250,000."

(v) The audited accounts of the fifth defendant for the year ended 31 December 1985 which expressly stated that the disputed property had not been transferred to the fifth defendant then because of a pending suit by a third party against the vendor.

(vi) The sale of the disputed property by the fourth defendant to the fifth defendant had been concluded in 1980 at a time when it was the subject matter of the present suit, and there being also a caveat prohibiting any dealing with regard thereto.

(vii) The fact that the fifth defendant had purchased the disputed property from the fourth defendant for a consideration of RM250,000 subject to all existing encumbrances, including purportedly, an existing charge securing the repayment of RM3 million to the chargee Malaysia Borneo Finance Corporation (m) Sdn. Bhd. gave rise to the inference that the sale was not *bona fide* and showed the intimate connection between the fourth defendant and the fifth defendant.

(viii) Notwithstanding the matters aforesaid, the fifth defendant proceeded to procure the registration of the transfer of the disputed property to itself, this being effected on 21 April 1987; that is to say some two weeks before the date which had been fixed for the hearing of this suit.

In these circumstances, the plaintiff prayed *inter alia*, for specific performance of the contract of sale of 9 July 1973, damages for breach of contract in lieu of or in addition to specific performance; alternatively, rescission of the contract of sale and return of the deposit of RM17,500 together with interest thereon at such rate as the Court may determine from 6 November 1973 to date of payment thereof and, of course, the costs of the action.

I must now turn to consider the evidence led on behalf of the defendants.

It is unnecessary to consider the case for the first and second defendants at any length, because as I have already mentioned, the action against them had been discontinued though this happened only after they had been cross-examined somewhat severely by Counsel for the plaintiff. The action against the third defendant, against whom it was sought to fasten vicarious liability for the acts of the first and the second defendants was, of necessity, likewise discontinued. All I propose therefore to do is to make a very brief reference to the defence of the first and the second defendants as this may be relevant for purposes of getting a full picture of the case.

It was admitted by the first and the second defendants that on the date and at the time and place referred to by the plaintiff, the first defendant had suggested to the plaintiff that the latter might wish to purchase the disputed property from the fourth defendant who the first

defendant honestly believed had the right to sell the same. But, the first defendant denied that the plaintiff had enquired of him about the title or ownership of the disputed property. Similarly, the first defendant denied that he had assured the plaintiff that the title deed of the disputed property was in the vaults of the third defendant's premises.

As for the second defendant, he too denied that he had assured the plaintiff that the fourth defendant was the owner of the disputed property.

Both the first and the second defendants went on to deny that they had made any of the representations attributed to them by the plaintiff and also denied that whatever part they might have played in the matter of the plaintiff's intended purchase of the disputed property was as servants or agents of the third defendant.

Apart from the fact that the first and the second defendants had been given to understand that the plaintiff required the disputed property for the purpose of a credit and finance business, they had no knowledge for what other purposes the plaintiff required the same for.

The first and the second defendants further alleged that the plaintiff was most anxious to sign the contract of sale that very day; that is to say, on 9 July 1973, and to this end he had requested the first defendant to instruct Mr. Charles Ong, on his behalf, to prepare the same.

The first defendant then duly obliged the plaintiff and straightaway spoke to Mr. Charles Ong on the telephone requesting him to prepare the contract of sale forthwith for execution that very day by the plaintiff. At the same time, the first defendant had supplied Mr. Charles Ong with the usual particulars relating to the parties, the subject matter of the sale, the consideration, the amount to be paid by way of deposit on execution of the contract of sale, and the date for completion. Later, on the same day, Mr. Charles Ong did attend at the third defendant's premises bringing along with him the contract of sale.

Mr. Charles Ong was called as a witness by the fourth defendant and I propose, at this point, to touch briefly on his evidence.

He testified that at about 10 a.m. on 9 July 1973 he had received a telephone call from the first defendant requesting that he prepare the contract of sale for execution by the parties who would be waiting at the third defendant's premises to execute it that very morning.

Mr. Charles Ong replied that he could prepare the contract of sale in the time available but could not vouch for the ownership of the disputed property and so was not prepared to attest the signatures of the parties. Indeed, he maintained that he was not acting for anyone in the matter of the sale and purchase and received no fee for preparing the contract of sale. Nevertheless, prior to execution of the contract of sale he did instruct one of his staff to make a search at the Registry of Titles to ascertain who the registered proprietor of the disputed property was but only received the result thereof (See Ex. D23 A to D) within one week after execution of the contract of sale.

Describing the events at the third defendant's premises on 9 July 1973, Mr. Charles Ong said that on arrival there, he found the plaintiff, Mr. Ooi Choon Lye and one Mr. Yap Seong Weng, both directors of the fourth defendant, the first defendant and the second defendant, present.

He had not explained the contents of the contract of sale to Mr. Ooi Choon Lye, who signed on behalf of the fourth defendant and whose signature was attested by Mr. Yap Seong Weng. He recalled that Mr. Ooi did not ask for independent legal advice before signing the contract of sale. The plaintiff's signature, he said, was witnessed by the first defendant.

Subsequently, upon becoming aware from the result of search that the fourth defendant was not the registered proprietor of the disputed property, Mr. Charles Ong telephoned the first defendant and informed him of this fact. This was within one week of the execution of the contract of sale.

Mr. Charles Ong further testified, without challenge, that upon being informed of the result of search, the plaintiff expressed surprise and remarked, "How could they (the fourth defendant) have sold?" Mr. Charles Ong then told the plaintiff that according to the second defendant, the fourth defendant had purchased the disputed property and explained to the plaintiff that if by the completion date, the fourth defendant was able to give a valid and registrable transfer then all would be well. Upon hearing this, Mr. Charles Ong's impression was that the plaintiff appeared to be satisfied and expressed no wish to rescind the contract of sale.

Notwithstanding the above facts, the plaintiff did cause to be issued a writ for damages for professional negligence against Mr. Charles Ong arising out of the contract of sale he had prepared but later discontinued the action.

The first question which arises for decision is whether the fourth defendant was entitled to rescind the contract of sale and to forfeit the deposit in the manner it did.

It is obvious that nowhere in the contract of sale are these express words stipulating that time shall be of the essence of the contract. Nor am I persuaded by the nature of the subject matter of the contract; namely, an ordinary shophouse with vacant possession, or by the surrounding circumstances, that time was the essence of the contract. Like Ismail Khan J (as he then was) in *S. Ayadurai v. Lim Hye* [1959] MLJ 143, I would quote, in support, the following passage in the judgment of Harman J in *Smith v. Hamilton* [1951] 1 Ch. 174 at p. 179:

> There are circumstances in which time can be said to be of the essence of the contract from the beginning. It is well known that time may be of the essence of a sale of licensed premises, or of a shop as a going concern, or, perhaps, it may be so on a sale of animals when they are in a certain place. But it would need very special circumstances to make time of the essence of the contract on a sale of an ordinary private dwelling-house with vacant possession.

In the circumstances, I agree with Counsel for the plaintiff that the law applicable as regards this part of the case is contained in s. 56(2) of the Contracts Act (Revised-1974) which provides:

> If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do the thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by the failure.

It follows, that the purported notice threatening forfeiture of the deposit dated 6 November 1973, reproduced above, and requiring completion on the same day, was not a reasonable notice.

On two further grounds also the purported notice was invalid.

Clause 7 of the contract of sale provides:

> If the purchaser shall fail or omit to pay the balance purchase price or any part thereof within the time as stipulated in Clause 3 hereof it shall be lawful for the vendor at any time **thereafter** to determine this agreement and thereupon the same shall determine and be null and void and of no further effect. Upon such determination as aforesaid the deposit paid under Clause 2 hereof shall be forfeited to the company absolutely as agreed liquidated damages. (Emphasis is mine)

Clause 3 provides that the balance of the purchase price was to be paid by 6 November 1973, and so any notice terminating the contract of sale under Clause 7 would have to be given **thereafter** that is to say, after 6 November 1973, yet the notice was sent on 6 November 1973. This was premature.

Furthermore, the notice was addressed to Ms. Jayaraman Ong & Co who, as it turned out, were not the solicitors for the plaintiff, although they did make an unsuccessful attempt to pass it on to him the next day.

For all these reasons, I would hold that the purported notice of termination of the contract of sale was invalid and therefore ineffective.

Now, it is settled law that the recipient of an invalid notice is entitled to treat it as a repudiation of the contract by the giver, rescind by accepting the repudiation and thereafter be excused from further performance and either sue for all moneys paid or sue for damages for breach. As Barwick CJ said in *Mehmet v. Benson* [1965] 113 CLR 295, 305:

> But apart from any intention to acquiesce in the notice of rescission which might be attributed to him because of his inaction, it was of course possible for the plaintiff to have actually accepted the inoperative notice of rescission as a repudiation of the contract by the defendant. The contract would then have been discharged by the plaintiff's acceptance.

On the other hand, the plaintiff is entitled to treat the contract as on foot, continue performing his obligations and, in particular, tender payment and seek specific performance. (See *Kennedy v. Vercoe* [1960] 105 CLR 521; *Monaghan v. Thomas* [1974] NZLR 340.

In the present case, the plaintiff did not accept the fourth defendant's purported repudiation of the contract, for, on 23 November 1973, his solicitors had written to the fourth defendant stating that the plaintiff was prepared to complete the purchase within two days if the fourth defendant were the registered proprietor failing which the plaintiff would rescind the contract on grounds of misrepresentation, namely, that the fourth defendant was the owner of the disputed property when in fact it was not, and would sue for the recovery of the deposit of RM17,500 and damages estimated at RM35,000. (See pp. 15, 16 AB1 reproduced above). In the event, however, the plaintiff did issue a writ on 18 June 1974 against the first defendant, the second defendant, the third defendant and the fourth defendant and prayed as against the fourth defendant for specific performance of the contract of sale and, in addition, or alternatively, for damages.

As already noted, an unaccepted repudiation does not terminate the contract; "it is a thing writ in water, and of no value to anybody; it affords no right of any kind". (Per Asquith LJ in *Howard v. Pickford Tool Co. Ltd.* [1951] 1 KB 417 at p. 421.

It is important to note, however, that if the innocent party does not elect to accept the repudiation "he keeps the contract alive for the benefit of the other party as well as his own; he remains subject to all his own obligations and liabilities under it, and enables the other not only to complete the contract, if so advised, notwithstanding his previous repudiation of it, **but also to take advantage of any supervening circumstances which would justify him in not completing it.**" (Emphasis is mine) (Per Cockburn in *Frosh v. Knight* [1972] LR 7 Ex Ch 111, 112; affirmed in *Avery v. Bowden* [1866] 5 E & B 714; 119 ER 1119).

In the particular circumstances of the present case, the issue of central importance as between the plaintiff and the fourth defendant was whether the plaintiff was justified in withholding the payment of the balance of the purchase price until the fourth defendant was able to satisfy the plaintiff that it had legal title to the disputed property at the material time.

Now, It is common ground that Clause 2 of the recital to the contract of sale stated - quite incorrectly - that the fourth defendant was the registered proprietor of the disputed properly as at the date thereof. The contract of sale was, as I have said, prepared by Mr. Charles Ong, acting on the instructions of the first defendant who in turn acted on behalf of the plaintiff. This was on 9 July 1973. Certainly, the fourth defendant did not give instructions for the preparation of the contract of sale. In the event, it will be recalled that Mr. Charles Ong called at the third defendant's premises later the same day where the contract of sale was duly executed by the plaintiff, apparently in a hurry, although he had been told by Mr. Charles Ong that no search had been made of the Register Document of Title to verify the claim in the contract of sale that the fourth defendant was the owner of the disputed property. It was also executed by Mr. Ooi Choon Lye, a director of the fourth defendant, who presumably had read its contents before doing so.

Be that as it may - at a later date - probably in August 1973 (see the letter dated 9 January 1975 AB1 p. 35) - the plaintiff became aware that the fourth defendant was not the registered proprietor of the disputed property when he sought the signature of the fourth defendant to some building plans in respect of certain renovation works he had intended carrying out to the disputed property. Indeed, within one week of execution of the contract of sale - so Mr. Charles Ong testified - and I believe him - that he had informed the plaintiff that the fourth defendant was not the registered proprietor of the disputed property. This was when the plaintiff called on Mr. Charles Ong to collect the contract of sale.

It is worth repeating that Mr. Charles Ong further testified, that when he had informed the plaintiff of the result of his search, the latter expressed surprise and remarked "How could they have sold?". Whereupon, Mr. Charles Ong explained to the plaintiff that according to the second defendant, the fourth defendant had purchased the disputed property and that if by the completion date the fourth defendant was able to give a valid and registrable transfer then all would be well. Mr. Charles Ong added - and again I believe him - that upon hearing this the plaintiff appeared to be satisfied and did not express any wish to rescind the contract of sale.

It is, of course, trite law that the right to rescind is lost if a purchaser fails to exercise it immediately and definitely (*Haynes v. Hirst* [1927] 27 SR (NSW) 480), as soon as he discovers the want of title in the vendor otherwise he keeps the contract alive as against himself as well as the vendor (*Macdonald v. Marson* [1913] 33 NZLR 248).

So too, if the purchaser even seeks an explanation, instead of immediately repudiating the contract, he thereby elects to treat it as subsisting (*Haynes v. Hirst* (*ibid*) and will be deemed to have waived the right (*Harold Elliot Ltd. Pierson* [1948] 1 Ch. 452. The right to rescind is lost because a person who has open to him two alternative courses or remedies, must elect between them and exercise such election in such a way that the other party may know which attitude he is adopting. Once he has exercised his option either way, he is bound by it (*Haynes v. Hirst* (*ibid*)).

To revert to the present case, so far as the plaintiff was concerned, the fact that the fourth defendant was not the registered proprietor of the disputed property even as late as when Mr. Charles Ong had informed him of that fact following the search of the Register Document of Title did not matter. In my view, the stand the plaintiff then took coincided with the obligations of the parties arising from a proper construction of the contract of sale; namely, that upon payment of the balance of the purchase price by the plaintiff on or before 6 November 1973, the fourth defendant had to be in a position to give title to the plaintiff. These obligations flow from the provisions of clauses 3 and 5 of the contract of sale which are as follows:

Clause 3: The balance purchase price shall be paid on or before 6 November 1973.

Clause 5: Upon payment of the balance purchase price as referred to in Clause 3 hereof the vendor shall execute a valid and registrable transfer in National Land Code Form 14A of the said land in favour of the purchaser or his nominee or nominees.

I am fortified in the view I take by the principle that the primary inquiry will always be as to the precise nature of the vendor's obligations under the terms of the particular contract in order to effect completion. (See *Rands Developments Private Ltd. v. Davis* [1975] 6 ALR 631 and authorities there cited). So, for example, in *Jonray (Sydney) Pty. Ltd. v. Partridge Bros. Ltd.* [1969] 89 WN (NSW) 568 it was held that it was no valid objection to a conveyance in that case that the vendor was not registered as proprietor and could only tender "a transfer by direction" that is a memorandum of transfer under the Real Property Act 1900 (NSW) duly executed by the registered proprietor at the vendor's direction (attested by the vendor's execution of the instrument).

I also note that the learned authors of Stonham, *Vendor and Purchaser* (p. 655, para. 1304), appear to think that a purchaser cannot insist that the land be conveyed to him by the vendor and that the vendor will discharge his obligation by procuring a transfer from the registered proprietor at his direction.

Moreover, at Common Law, a vendor by the mere sale does not affirm that he is at the date of the contract the owner of the land, or even in possession of it, but promises that when the time comes for making his title, he will be prepared to do so: *R. v. Cunningham* [1899] 1 WALR 9, 21 Austn Digest 729; *Harold Elliott & Co. Ltd. v. Pierson* (*ibid*). And there is nothing inherently impossible in the performance of an agreement to sell land belonging to a third person: *Rosel v. Adam* [1876] 2 VLR (L) 170, 4 Austn Digest 662.

I am not therefore satisfied that the plaintiff was justified in withholding payment of the balance of the purchase price until the fourth defendant was able to satisfy the plaintiff that it had a legal title to the property at the material time.

The evidence discloses that the fourth defendant was at the material time the holder of an option to purchase the property, it having been given by DW4 the authorised agent of the registered proprietor. The evidence also disclosed that the fourth defendant had exercised the option and became the registered proprietor of the property, though, admittedly only on 30 November 1973.

But, as I have said, - and this is a point which is vitally important - the obligation of the fourth defendant under Clause 5 of the contract of sale was to give title to the plaintiff upon payment of the balance of the purchase price to the fourth defendant on or before 6 November 1973 under Clause 3.

I am satisfied upon the evidence that the fourth defendant had shown itself to be ready willing and able to proceed to complete the contract of sale in accordance with its terms had the plaintiff made payment of the balance of the purchase price.

The next point for consideration is whether the plaintiff was ready to complete at the material time.

In relation to a purchaser, readiness to complete would consist of his having access to funds. I accept that a purchaser would not fail that test by reason of the fact that he was depending on a loan to be advanced on the security of property bought at least provided the lender was ready to advance and the security documentation was ready and executed in escrow.

Counsel for the plaintiff had endeavoured to demonstrate that the plaintiff was ready, able and willing to complete. It was pointed out that the plaintiff had, at the material time, post dated cheques to the tune of RM1 million in the custody of the third defendant and that a representative of a finance company (PW2) had stated that those cheques were negotiable. It was further pointed out by Counsel that the plaintiff's family had a prosperous business in Thailand and that his wife held a piece of land as trustee in which she had a minor share.

In my opinion, the evidence relied on by Counsel to demonstrate that the plaintiff had access to sufficient funds to complete was less than slender. For example, the evidence of PW2 was at best purely speculative since no application for a loan had in fact been made to the finance company which he represented. No proof was furnished as to any security which the plaintiff could have furnished in support of an application for a loan. As for the plaintiff's testimony that his family had a prosperous business in Thailand, I need no more than say that this was evidence of a very general character and wholly unconvincing. Similarly, the claim that his wife held land as trustee in which she had a minor share as beneficiary suffers from the same defect. Moreover, no proof was furnished as to the value of the wife's interest and whether it was marketable and even if so, perhaps, an application for leave to sell would have been necessary which might not necessarily have been granted. There was also evidence which emerged during the cross-examination of the plaintiff by Counsel for the third defendant that the plaintiff had applied for a loan to the third defendant but that this had been turned down.

In this context, it is pertinent to refer to more general considerations such as the conveyancing practice of appointing stakeholders.

In *Tan Suan Sim v. Chang Fook Sheng* [1980] 2 MLJ 66, Chang Min Tat FJ, said this:

> It did not appear to have been sufficiently realised and the appellant was unfortunate in not realising for herself or in not obtaining the proper advice that in the Torrens system of registration of titles, the property does not pass until the transfer has been effectively registered against the issue document of title in the relevant registry of titles. For this reason, it is not merely the usual practice but an almost inevitably necessary requirement in any agreement of sale under the Torrens system to appoint a stake-holder, who, need not be but is ordinarily the solicitor for the vendor and who undertakes to hold the money which would be paid over by the purchaser upon the execution of the relevant transfer until the registration of the transfer, when he would pay it to the vendor. If for any reason the registration is not effected or proceeded with, then his undertaking would be to return the money to the contending purchaser. For the same reason, where the money is to be paid by a third person, example a chargee as the bank in this case, who would require a charge to be executed by the purchaser to secure the repayment of the loan, the appointment of a stakeholder would be just as necessary...

The plaintiff did not, however, appoint a stakeholder and leave with him the balance of the purchase price. Indeed, in answer to a query from me, his Counsel confirmed that even up to the hearing the plaintiff had not deposited the balance of the purchase price with anyone or paid it into Court.

Accordingly, I am satisfied that the plaintiff was not able to discharge his financial obligation under the contract of sale, and so could not have served an effective notice to complete as his solicitors had endeavoured to do by their letter dated 23 November 1973, and would therefore be liable in damages.

Generally speaking, on a sale going off through the purchaser's default, he cannot recover his deposit. (*Ward v. Ellerton* [1927] VLR 494).

In the present case, the sale had gone off through the plaintiff purchaser's default and so the deposit would have to be forfeited in accordance with Clause 7 of the agreement which provides:

> If the purchaser shall fail or omit to pay the balance purchase price or any part thereof within the time as stipulated in Clause 3 hereof it shall be lawful for the vendor at any time thereafter to determine this agreement and thereupon the same shall determine and be null and void and of no further effect. Upon such determination as aforesaid the deposit paid under Clause 2 hereof shall be forfeited to the company absolutely as agreed liquidated damages.

Looking back, I would add that although the notice to complete dated 6 November 1973, served by the fourth defendant's solicitors on Messrs Jayaraman Ong & Co as solicitors for the plaintiff was invalid, for the reasons given, I am satisfied that even had a valid notice to complete been served on the plaintiff, in view of his lack of financial resources, the plaintiff would not have been able to comply with a valid notice to complete if it had been given and so the plaintiff was in anticipatory breach by reason of impossibility of performance. (See *Establishment Chainbaux S.A.R.L. v. Harbormaster Ltd.* [1955] 1 Ll Rep. 303 and *Universal Cargo Carriers Corporation v. Citati* [1957] 2 QB 401, per Devlin J (as he then was), especially at p. 448 where he expounds the principle).

In the result, the suit against the fourth defendant is dismissed with costs.

I next turn to consider the plaintiff's cause of action against the fifth defendant. It was alleged that the disputed property had been fraudulently transferred by the fourth defendant to the fifth defendant on 20 April 1987, that is to say while the suit herein was still pending, and indeed partly heard.

By way of amplification, it was alleged that the fifth defendant was not a *bona fide* purchaser for value without notice of the plaintiff's interest in the disputed property and that the purpose of the purported sale and transfer was to deprive the plaintiff of the benefit of his claim for specific performance of the contract of sale. The decision of the High Court of Australia in *Bahr v. Nicolay* (No. 2) [1988] 62 ALJR 268 was cited in support.

It is obvious that if, as I have concluded, the plaintiff is not entitled to an order of specific performance against the fourth defendant and indeed that his action against the latter must stand dismissed out of this Court, a pre-requisite for success of his suit against the fifth defendant would be absent, and so the action against the fifth defendant must inevitably be also dismissed.

It is therefore unnecessary to delve into the intricacies of the facts and the law relevant to the charge of fraud against fourth and fifth defendants.

But, had it been necessary to do so, I was not persuaded that the charge of fraud sufficient for s. 340 of the Code as explained by Raja Azlan Shah CJ (as he then was), in *PJTV Denson (M) Sdn. Bhd. v. Roxy (M) Sdn. Bhd.* [1980] 2 MLJ 136, 138 approving Romilly MR in *Green v. Nixon* [1857] 53 ER 208 and *Waimiha Sawmill Co. v. Waione Timber Co.*, [1926] AC 101, 106 was made out. In this context, note also, *Tai Lee Finance Co. Sdn. Bhd. v. Official Assignee & Ors.* [1983] CLJ (Rep) 387.

The facts in the *Waimiha* case are noteworthy. There the registered proprietor of land, Howe, granted timber rights to the appellant which protected its agreement by caveat. Howe purported to determine the appellant's interest for breach of covenant. The appellant appealed against a judgment upholding Howe's re-entry. While the appeal was pending, Howe sold the land to Wilson who was acting as agent for a company to be formed, the respondent. Howe

obtained an order for removal of the caveat (against which the appellant did not appeal) and transferred the land to Wilson. Wilson later transferred the land to the respondent. The appellant's appeal against the judgment upholding Howe's re-entry was itself upheld.

Notwithstanding that Wilson knew of the appellant's claim and of the litigation between it and Howe, the Privy Council held that there had been no fraud on the part of the respondent.

The case shows that there is no fraud on the part of the registered proprietor in merely acquiring title with notice of an existing unregistered interest or in taking a transfer with knowledge that its registration will defeat such an interest. (See also *Mills v. Stokman* [1967] 116 CLR 61 at p. 76).

Indeed, Lord Buckmaster, when speaking for their Lordships of the Judicial Committee of the Privy Council quoted (at p. 106) with approval the following passage in the judgment of Lord Lindley, in *Assets Co. v. Mere Roihi* [1905] AC 176 at p. 210: "Fraud...means actual fraud, dishonesty of some sort, not what is called constructive or equitable fraud..." Lord Buckmaster then went further (at pp. 106-107) to illustrate the principle, by mentioning as examples of fraud, a transfer whose object is to cheat a man of a known existing right and a deliberate and dishonest trick causing an interest not to be registered.

In the present case, although the plaintiff's second caveat had lapsed on 18 November 1986, he took no steps to protect his interest in the property, for a period of some five months with the result that the transfer of it from the fourth defendant to the fifth defendant was registered on 21 April 1987. The reason for this inaction and delay, according to the plaintiff, was because he had left the matter to his lawyer.

But Counsel for the fifth defendant questioned the truth of this explanation - in my view, not without justification.

It was argued that the plaintiff was not really interested in the disputed property, his intention being to get whatever damages he could from the first, second and third defendants. In support, my attention was directed by Counsel for the fifth defendant to the testimony of Mr. Leong Chee Kong (DW7) a director of the fifth defendant, as to a meeting sometime in 1976 between DW7 and the plaintiff ("the meeting of 1976") at which the plaintiff had allegedly told DW7 that the third defendant was supposed to have given him a loan to buy the disputed property but had played him out by going back on its word and refusing the loan. DW7 went on to allege that the plaintiff was, as a result, very angry and told him that he (the plaintiff) wanted "to nail the first, second and third defendants" for not giving him a loan to purchase the property.

When Counsel for the fifth defendant put to the plaintiff the events at the meeting of 1976 as deposed to by DW7, the plaintiff first said that he could not recall them but then added that DW7's version was untrue.

There was, however, the testimony of Mr. Yeow Ewe Choon (DW2), the branch manager of the third defendant, that the plaintiff had indeed made an unsuccessful application to the third defendant for a loan at the material time - a fact which was quite consistent with DW7's version.

The issue as regards this part of the case is the credibility of the plaintiff on the one hand as against the credibility of DW7 on the other.

As for the plaintiff, the action opened and indeed the trial proceeded, for a while, with the claims against the first defendant and the second defendant, for having made fraudulent misrepresentations as regards the ownership of the disputed property and had thereby

induced him to enter into the contract of sale with the fourth defendant. The plaintiff further alleged in his statement of claim that he had paid them a commission of RM5,000 for their efforts in putting through the deal. As for his claims against the third defendant, this was founded on the allegation that the first and second defendants were at the material time the servants or agents of the third defendant, and by reason of their statements and actions having been made in the course of their employment, the third defendant was vicariously liable.

Then, as I have already noted, the plaintiff thought better of his case against the first, the second and the third defendants and discontinued the action against them, though only at the hearing, whilst confining his action to the claims against the fourth and the fifth defendants for specific performance of the contract of sale and, at the same time, alleging that the transfer from the fourth defendant to the fifth defendant was fraudulently designed to defeat his claim for specific performance. Earlier, as I have already noted, the plaintiff had issued a writ against the legal firm of Messrs Jayaraman Ong & Co. alleging professional negligence in the matter of the contract of sale of the disputed property, but also thought better of his case and discontinued that action as well.

It seems to me, that the plaintiff was quite reckless about making serious allegations with little or no regard as to their truth. He is also obviously a very shrewd man who could well appreciate the significance of the questions put to him in cross-examination regarding the meeting of 1976. The extent of his memory seemed to be directly proportional to the desirability of his having any recollection on the point. Tested in this way, I am of the view that the general credibility and reliability of the plaintiff as a witness was wanting. In the witness box the impression he made upon me was that of a person upon whose testimony it would be dangerous to rely at its full face value. By contrast, DW7 was a far more convincing witness.

Without mincing words, I would say that I prefer the testimony of DW7 to that of the plaintiff in so far as the events at the meeting of 1976 are concerned.

Be that as it may, the result of the failure on the part of the plaintiff to protect his alleged interest between the period from 18 November 1986 to 20 April 1987, following expiry of his second caveat on 18 November 1986, was that the transfer of the disputed property from the fourth defendant to the fifth defendant was duly registered on 21 April 1987 or in other words, some five months after expiry of the caveat.

I might mention, in passing, that although it had been alleged in para. 33 of the amended statement of claim that the plaintiff did not lodge a subsequent caveat because the fourth defendant's former solicitors Messrs Jayadeva and Kamal had given an oral undertaking to his solicitors that their clients (the fourth defendant) would not transfer the disputed property pending the outcome of the present action, not an iota of evidence was adduced in support of this averment.

Turning to the reasons for the transfer from the fourth defendant to the fifth defendant, there was the testimony of DW7, that the object of the fourth defendant selling the disputed property to the fifth defendant was to reduce the fourth defendant's debt commitment to the Malaysia Borneo Finance Corporation Bhd. and the object of the fifth defendant buying it was to have office premises of its own to develop the disputed property together with its adjoining property into a Multi-Storey Office Building. (See Ex.D 31(a)(b)). DW7 further testified that the actual consideration for the transfer from the fourth defendant to the fifth defendant was RM250,000 and that this sum was paid to the Malaysia Borneo Finance Corporation by the fifth defendant on behalf of the fourth defendant.

On the other hand, Counsel for the plaintiff submitted that although the sale and purchase agreement dated 29 August 1980 (pp. 1 - 3 AB2) had recited that the disputed property "is presently charged to MBF" and that "the vendors had agreed to sell and the purchaser agreed to purchase with all encumbrances", the charge referred to was not a charge over the disputed property but over land situated in Alor Setar owned by Kota Tanah Sdn. Bhd., an associate company of the fourth and the fifth defendants as evidenced by Ex. D26. On this basis it was submitted that DW7 was lying in respect of the recitals aforesaid, and that the sale and purchase agreement dated 29 August 1980 was a sham designed to conceal the fraudulent designs of the fourth and the fifth defendants. Counsel for the fifth defendant replied that this defect was due to bad drafting of the agreement.

For myself, the question of critical substance at the end of the day, so far as this part of the case is concerned, comes to this: can it be said, in the words of Lord Lindley in *Assets Co. v. Mere Roibi* (*ibid*), that the designed object of the transfer of the disputed property from the fourth defendant to the fifth defendant was to cheat the plaintiff of a known existing right and a deliberate and dishonest trick to cause his interest not to be registered?

Despite the criticisms made by the Counsel for the plaintiff as regards the explanation offered for the transfer to the fifth defendant, I am firmly of the view that the evidence, taken as a whole, gets nowhere near to proving that the transfer was fraudulent within the language of Lord Lindley. I see nothing improbable in the suggestion that at the time of the transfer, the boards of the fourth and the fifth defendants had hoped and perhaps even expected that the plaintiff would not seek an order for specific performance of the contract of sale but would confine his suit to claims against the fourth defendant for refund of the deposit and payment of damages, regard being had to the events at the meeting of 1976 and the inaction and delay on the part of the plaintiff following expiry of the second caveat lodged against the disputed property, **and/or** they might have anticipated that the plaintiff would not succeed in his claim for specific performance. But, that in itself, does not justify a finding that the designed object of the transfer was to cheat the plaintiff of a known existing right and a deliberate and dishonest trick to cause his interest not to be registered. There must be evidence from which a Court can properly infer such an intent and the Privy Council has held that the onus of proof of fraud even in a civil case in Malaysia is proof beyond reasonable doubt. (*Saminathan v. Pappa* [1981] 1 MLJ 121, 126 per Lord Diplock, 126). It is not enough to show that the transfer had **the effect** of depriving the plaintiff of a known existing right. It must be demonstrated that the transfer was executed with the **intention** of cheating the plaintiff of such right. Furthermore, it is immaterial to decide whether there were other intentions and equally immaterial to decide which was the dominant intention. The intention to cheat must be one which has a substantial influence on the decision to make the transfer.

In all the circumstances, I find that the charge of fraud against the fourth and the fifth defendants, whether separately or jointly, has not been made out, with the result that the suit against them is also dismissed with costs.

Also found at [1990] 2 CLJ 203